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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL BRANCH, an) Case No. CV 09-08966 DDP (AJWx)
individual,)
)
Plaintiff,) **ORDER TO SHOW CAUSE WHY THIS CASE**
) **SHOULD NOT BE REMANDED FOR LACK**
) **OF SUBJECT MATTER JURISDICTION**
v.)
)
TRIMAC TRANSPORTATION, INC.,)
a business entity; AIR)
PRODUCTS AND CHEMICALS,)
INC., a business entity;)
ROBIN REYNOLDS, an)
individual JIM T., an)
individual; RICKE WEIRD,)
)
Defendants.)
)

The Court orders the removing defendant Air Products and Chemicals, Inc. ("Defendant") to show cause why this case should not be remanded for lack of subject matter jurisdiction.

On September 29, 2009, the plaintiff Michael Branch ("Plaintiff") filed a complaint in Los Angeles Superior Court, asserting, among others, causes of action under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900 et seq., stemming from harassment, discrimination, and retaliation he alleges he was subjected to by his supervisor, co-workers, and

1 employer on the basis of his race and perceived sexual orientation.
2 On December 7, 2009, Defendant filed a Notice of Removal on the
3 basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).
4 (Dkt. No. 1.) Defendant Trimac Transportation, Inc., joined in the
5 Notice of Removal. (Dkt. No. 4.)

6 Defendant asserts in its Notice of Removal that the
7 citizenship of one of the defendants, Robin Reynolds, should be
8 ignored for purposes of diversity jurisdiction because he was
9 fraudulently joined. (Notice of Removal ¶22.) The Complaint makes
10 no allegations regarding Mr. Reynolds' citizenship for purposes of
11 diversity jurisdiction.

12 Pursuant to 28 U.S.C. § 1441(a), an action brought in state
13 court may be removed to federal court if the civil action is one
14 "of which the district courts of the United States have original
15 jurisdiction." The district courts have original jurisdiction "of
16 all civil actions where the matter in controversy exceeds the sum
17 of value of \$75,000, exclusive of interest and costs and is between
18 citizens of different States." 28 U.S.C. § 1332(a)(1). Complete
19 diversity of citizenship is required, meaning each of the
20 plaintiffs must be a citizen of a different state than each of the
21 defendants. Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996).

22 Nevertheless, "one exception to the requirement of complete
23 diversity is where a non-diverse defendant has been 'fraudulently
24 joined.'" Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067
25 (9th Cir. 2001). "Fraudulently joined defendants will not defeat
26 removal on diversity grounds." Ritchey v. Upjohn Drug Co., 139
27 F.3d 1313, 1318 (9th Cir. 1998). "[T]here is a general presumption
28 against fraudulent joinder," Hamilton Materials, Inc. v. Dow

1 Chemical Corp., 494 F.3d 1203, 1206 (9th Cir. 2007), but fraudulent
2 joinder will be found "[i]f the plaintiff fails to state a cause of
3 action against a resident defendant, and the failure is obvious
4 according to settled rules of the state." Ritchey, 139 F.3d at
5 1318. The party asserting fraudulent joinder bears the burden of
6 proof. United Computer Systems, Inc. v. AT&T Corp., 298 F.3d 756,
7 763 (9th Cir. 2002).

8 Defendant argues that Plaintiff cannot state a claim against
9 Robin Reynolds "for sexual orientation discrimination and
10 harassment, and discharge in violation of public policy," because
11 such claims "are not cognizable against Defendant Reynolds as a
12 matter of law," as "[s]upervisors and other employees cannot be
13 held personally liable for discrimination in connection with
14 personnel decisions." (Notice of Removal ¶ 24 (citing Reno v.
15 Baird, 18 Cal.4th 640 (1998); Janken v. GM Hughes Electronics, 46
16 Cal. App. 4th 55, 65 (1996)).)

17 However, while an FEHA discrimination claim will not lie
18 against a plaintiff's individual supervisors, harassment and
19 retaliation claims will. Baird, 18 Cal.4th at 645-47
20 (distinguishing harassment claims from discrimination claims and
21 holding that individual supervisors cannot be held liable for
22 discrimination under FEHA); Janken, 46 Cal. App. 4th at 62-63
23 (holding that, in enacting FEHA, the California legislature
24 intended that supervisors would be personally liable for
25 harassment); Matthews v. Superior Court, 34 Cal. App. 4th 598, 604
26 (1995) (holding a supervisor can be held personally liable for
27 sexual harassment under FEHA); Page v. Superior Court, 31 Cal. App.
28 4th 1206, 1212 (holding that supervisors are personally liable

1 under FEHA for harassment and retaliation claims); Fisher v. San
2 Pedro Peninsula Hospital, 214 Cal. App. 3d 590, 613 (1989) (holding
3 that co-workers can be held liable for retaliation claims under
4 FEHA). Plaintiff asserts retaliation and harassment claims under
5 FEHA against Robin Reynolds. (Compl. ¶¶ 63, 65.) Specifically,
6 Plaintiff alleges that he notified his supervisor Robin Reynolds
7 harassed him on the basis of his perceived sexual orientation and
8 that he retaliated against Plaintiff for complaining of the
9 discrimination and harassment he suffered. (See, e.g., Id. ¶¶ 32,
10 42-43.)

11 The Court therefore has doubts concerning the existence of
12 diversity jurisdiction because Defendants have not established (1)
13 that Robin Reynolds' citizenship is diverse from Plaintiff's for
14 purposes of diversity jurisdiction or (2) that Robin Reynolds'
15 citizenship should be disregarded because he was fraudulently
16 joined.

17 As a result, the Court orders the parties to file cross-
18 briefs, not to exceed ten pages, within 20 days of the date of this
19 Order, to show cause why this action should not be remanded to
20 state court for lack of subject matter jurisdiction. The Court
21 will interpret either party's failure to file such a motion as
22 consent to remand.

23 IT IS SO ORDERED.

24
25
26 Dated: January 14, 2010


DEAN D. PREGERSON
United States District Judge